

United States District Court  
Eastern District of California

Terry J. Burton,

Petitioner,

vs.

D.L. Runnels, Warden, et al.,

Respondents.

No. Civ. S 02-0675 LKK PAN P

Order

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Petitioner is a state prisoner without counsel seeking a writ of habeas corpus.

Petitioner's March 28, 2002, petition alleged a single claim that his Fifth and Fourteenth Amendment rights were violated by the use of his un-Mirandized statement to a deputy sheriff.

June 4, 2003, petitioner amended his petition and the court served the amended petition and ordered a response.

August 21, 2003, respondent, construing the amended petition as one alleging three claims (the Miranda claim, ineffective

1 assistance of counsel, and a claim regarding DNA testing), moved  
2 to dismiss arguing the ineffective assistance and DNA testing  
3 claims were untimely and not exhausted.

4 In January 28, 2004, findings and recommendations, this  
5 court construed the amended petition to allege the Miranda claim  
6 only, and recommended abeyance to permit petitioner to exhaust  
7 any ineffective assistance and DNA testing claims. The district  
8 court adopted the recommendations March 12, 2004, and the case  
9 was abeyed with instructions to petitioner to move for leave to  
10 amend once exhaustion was complete.

11 Presently before the court is petitioner's February 22,  
12 2005, motion for leave to file a second-amended petition.  
13 Respondent opposed April 15, 2005, and petitioner filed and  
14 served a reply April 18, 2005.

15 The proposed second-amended petition includes four claims:  
16 (1) the Miranda claim; (2) a claim of ineffective assistance of  
17 counsel based on 12 sub-claims (A) through (L); (3) a claim  
18 regarding DNA testing; and (4) a claim regarding the trial  
19 court's failure to excuse two jurors for cause based on implied  
20 bias.

21 Respondent argues, and petitioner concedes, that Claim 4 and  
22 sub-claims 2(I), (J), and (L) were not presented to the  
23 California Supreme Court.

24 Petitioner argues the court should deem the ineffective  
25 assistance sub-claims exhausted because he pursues a single claim  
26 he received ineffective assistance of counsel, based on numerous

1 factual predicates, and the allegations in sub-claims(I), (J) and  
2 (L) do not fundamentally alter the claim presented to the  
3 California Supreme Court.

4 Exhaustion of available state judicial remedies ordinarily  
5 is a prerequisite to obtaining federal habeas corpus relief. 28  
6 U.S.C. § 2254(d) (1) (A); Picard v. Connor, 404 U.S. 270 (1971). A  
7 petitioner satisfies the exhaustion requirement if: (1) he has  
8 "fairly presented" his federal claim to the highest state court  
9 with jurisdiction to consider it, Anderson v. Harless, 459 U.S. 4  
10 (1982); or (2) he demonstrates no state remedy remains available.  
11 Harmon v. Ryan, 959 F.2d 1457 (9th Cir. 1992). "Exhaustion  
12 requires the state prisoner give the state courts a 'fair  
13 opportunity to act' on each of his claims before he presents  
14 those claims in a federal habeas petition." Kelly v. Small, 315  
15 F.3d 1063 (9th Cir. 2003), quoting O'Sullivan v. Boerckel, 526  
16 U.S. 838, 844 (1999). "The state prisoner must describe in the  
17 state proceedings both the operative facts and the federal legal  
18 theory on which his claim is based so that the state courts have  
19 a 'fair opportunity' to apply controlling legal principles to the  
20 facts bearing upon his constitutional claim." Id. (internal  
21 quotations omitted).

22 By failing to apprise the California Supreme Court of facts  
23 alleged in sub-claims 2(I), (J) and (L) of his ineffective  
24 assistance claim, he deprived that court of a fair opportunity to  
25 act based on such facts. Kelly, 315 F.3d at 1068 (finding habeas  
26 petitioner must present each "failure" raised as a ground for a

1 finding of ineffective assistance in state court to meet  
2 exhaustion requirement). As to Claim 4, petitioner's reference  
3 in his state court petition to counsel's failure to object  
4 regarding the implied bias of two jurors did not exhaust his  
5 independent claim of constitutional error based on the court's  
6 seating of such jurors. See Rose v. Palmateer, 395 F.3d 1108,  
7 1111-12 (9th Cir. 2005) (claim counsel was ineffective for  
8 failing to object to introduction of confession did not exhaust  
9 claim that use of the confession as an independent constitutional  
10 claim), citing Kelly, 315 F.3d at 1068 n. 2.

11 Petitioner requests the court again abey this proceeding to  
12 permit him to exhaust these claims. The court will not.  
13 Petitioner offers no excuse for his continued piecemeal  
14 litigation, both in the California Supreme Court and here.  
15 Rhines v. Weber, \_\_\_ U.S. \_\_\_, 125 S.Ct. 1528 (2005) (federal  
16 court has discretion to stay habeas petition to permit exhaustion  
17 if petitioner shows good cause for his failure to present his  
18 claims to the state courts).

19 Accordingly, the court hereby orders that:

20 1. Petitioner's February 22, 2005, motion for leave to file  
21 a second amended petition is granted in part.

22 2. The Clerk of Court shall file petitioner's proposed  
23 pleading as petitioner's second amended petition, dated the date  
24 of this order. Claim 4 and sub-claims (2)(I), (J) and (L)  
25 therein are stricken. Respondent shall respond to the second  
26 amended petition within 30 days.

1 Dated: May 31, 2005.

2 /s/ Peter A. Nowinski

3 PETER A. NOWINSKI

4 Magistrate Judge